

The Indian Act has not exactly adopted this rule (which no doubt often is difficult to apply), and merely declares (section 74) that if a sum is specified, in case of breach, the party suffering, *whether or not actual loss is proved*, is entitled to receive *reasonable* compensation, *not exceeding* the sum named; which comes to this, that more than the fixed sum cannot be claimed, but if the Court does not think the sum ought to be given in full, it can reduce it to a reasonable sum; the Court cannot, however, refuse to allow the reasonable sum on the ground that actual damage is not proved, as long as there has been a real breach of the contract.

There is an exception to the rule which it is important to remember. The penalty named in any bail-bond, recognizance, or other instrument of the same nature, and in any security bond for the faithful performance of any *public duty or act in which the public are interested*, is recoverable as named, in case of breach of the agreement. (Section 74, exception.)

But this does not apply to security taken to fulfil a Government contract, at least not *necessarily*:—it would have to be *specially* shown that there is an act to be done in which “the public are interested.” (Section 74, exception.)

SECTION II.—CONTRACTS BY FOREST OFFICERS ON BEHALF OF GOVERNMENT.

§ 1.—*Original Power to contract for Government.*

I now proceed to explain how it is that forest officers can make contracts for Government^a. All the contracts which the forest officer, as such, has anything to do with are not contracts with him, but are popularly spoken of as Government contracts. It is obvious then that he makes them on behalf of Government pursuant to some delegated authority, and that personally he is not entitled to any benefit, nor liable to any responsibility, under the contract.

^a can only adopt the recognized official reasons and procedure as I find them. I am quite convinced, personally, that it is all based on a misinterpretation of the Act, as will appear presently.

As long as Government undertakes any kind of executive duty in departmental working, not to speak of other branches of Administrative Government, it cannot help entering into contracts. It may need to buy land, or lease it, to enter into contracts for goods to be supplied, or for work to be done.

Owing to the position of Government as successors to the East India Company, under the Act for the better Government of India⁹, "the Secretary of State for India in Council" was declared by that Act to be the representative of the State for the purpose of holding property, and of suing and being sued in the same manner as the East India Company might have been. Section 40 of the Act provides that the Secretary of State, with the concurrence of a majority of his Council, may sell and dispose of all real and personal estate, &c.; may raise money on mortgage, &c.; may purchase or acquire "any land or hereditaments or any interest therein, stores, goods, chattels and other property, and is empowered to enter into any contract whatsoever, as may be thought fit for the purposes of this Act * * * *."

§ 2.—*First attempt to remove the difficulty.*

But it is obvious that Government business could not be carried on for a week, if every contract had to be sent home to be executed or signed by the Secretary of State, and if a majority of his Council had to concur in each contract.

This difficulty was partly removed in 1859 by the provisions of the Statute 22 and 23, Vic. cap. XLI, sections 1-2.

This provides that (a) the Governor General in Council; (b) the two Governors; (c) the Lieutenant-Governor of the North-Western Provinces; and (d) any officer entrusted with the government, charge or care, of any Presidency, Province, or District¹⁰

⁹ 21 and 22, Vic. cap. 106.

¹⁰ It has been held by the Government law officers (and indeed it admits of no doubt) that "District" here means, not the charge of a Collector or Deputy Commissioner, but something analogous to the Presidency or Province previously spoken of, such for instance as Ajmer, Berar, &c., which are hardly "provinces."

in India (*i.e.*, any Lieutenant-Governor, or Chief Commissioner, or Resident having the charge of a territory) may (subject to such restrictions as the Secretary of State, with the concurrence of a majority of his Council, may prescribe) enter into contracts and buy lands and goods (exactly as in the 40th section of the Act of 1858, already quoted).

By the second section the Secretary of State in Council may be named in the contracts so made as a party to it (*i.e.*, as representing the State), and it is "sufficient to use the designation of the Secretary of State in Council in such deed, contract, or other instrument, and the same may be *expressed* to be executed on *behalf of the Secretary of State in Council* by or by order of" the Governor General in Council, the Lieutenant-Governor, &c., &c., "but may be executed in other respects in like manner as other instruments executed by or on behalf of him or them respectively in his or their official capacity."

These contracts may be enforced against the Secretary of State in Council for the time being, but "neither the Secretary of State nor any Member of his Council, nor any person executing such deed, contract, or other instrument, shall be personally liable in respect thereof, and all liabilities, costs, and damages in respect thereof shall be satisfied and paid out of the revenues of *India*."

It will be observed that this supposes that the contracts will be executed by the head of the Government in the province, on behalf of the Secretary of State, that they will be executed in the usual form in which Government instruments are executed, the Governor's act being indicated by his Secretary's signature, &c., as usual, only the document must say that it is made *on behalf of the Secretary of State by or by order of the Governor*. There is nothing whatever in this section which implies that the power of making contracts may be further delegated to certain officers, heads of departments, District Engineers, Collectors, and so forth; nor was anything settled on this subject till 1870, when the 33 and 34. Vic. cap. LIX was passed.

§ 3.—*Third Stage.*

The proximate cause of the passing of this Act was that a number of deeds had been issued in Madras for the grant of certain lands, by an official called "the Inam Commissioner." These deeds should (according to the 22 and 23, Vic. cap. XLI) have been expressed to be executed "by order of the Governor of Madras on behalf of the Secretary of State, &c.," but this form was not followed: the deeds were simply expressed to be executed "on behalf of the Governor¹." The matter had been remedied by a special Act as regards those particular deeds, but it was apprehended that other deeds generally in other parts might be held invalid *for a like reason*. Thereupon the Act (33 and 34, Vic. cap. LIX) declared (section 1) that all instruments executed before the Act, and for a limited period after it (to allow of its becoming known), if they were expressed to be executed "by" or "by order of" or "on behalf of" the Governor General, Governor, or Lieutenant-Governor or Chief Commissioner, or other officer entrusted with the care, &c. (as in the previous Act), were no less valid than if they had been executed in the form required by the Act 22 and 23, Vic. cap. XLI (which is, as we have seen, "*by or by order of the Governor, &c., on behalf of the Secretary of State.*")

The second section gives power to the Governor General in Council, by Resolution from time to time, to *vary the form of execution* required by the 22 and 23, Vic. cap. XLI, or to empower other authorities under his order to *vary it*.

§ 4.—*Power given to Public Officers.*

This second section has been held to authorize the Governor General in Council to issue a Resolution in the Home Department²,

¹ This appears from the 32 and 33, Vic. cap. XXIX, the Act which was separately and at once passed to render valid these particular inam deeds.

² The opinion is held that the terms "*vary the form of execution*" mean "*vary the mode of execution with reference to the party executing.*" I submit that this opinion cannot be correct. Looking to plain history of the case (and no one can doubt the facts of it as set forth in the text), the question of the subordinate officers who were entitled to contract by 'order of' the Governor, &c., was never conten-